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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 SHERI SWEENEY, QUI TAM PLAINTIFF,
11 for and on behalf of the United States of
12 America,

13 Plaintiff,

14 v.

15 MANORCARE HEALTH SERVICES, INC.,
16 a Delaware corporation; STACEY
17 MESAROS; "JOHN DOES(S)" 1 through 50;
18 and "JOHN DOE, INC.(S)" 1 through 5,

19 Defendants.

20 Case No. C03-5320RJB

21 (1) ORDER DENYING
22 DEFENDANTS' RENEWED
23 MOTION TO DISMISS
24 RELATOR'S FOURTH
25 CAUSE OF ACTION FOR
26 RETALIATION and

27 (2) ORDER RE: PROCEDURE

28 Defendants' Renewed Motion

29 This matter comes before the Court on the above-referenced motion (Dkt. 30). The court is
30 familiar with the records and files herein and all documents filed in support of and in opposition to this
31 motion. For the reasons stated below, the motion should be denied.

32 This is an FRCP 12(b)(6) motion requesting dismissal of plaintiff's fourth cause of action for
33 retaliation under 31 U.S.C. § 3730(h). The following are the basic rules governing such motions: A court
34 may dismiss a claim if it appears beyond doubt that the plaintiff can prove no set of facts to support the
35 claim that would entitle the plaintiff to relief. *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983)
36 (citing *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957)). Dismissal may be based on either the lack of a
37 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*
38 *v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are

1 taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d
2 1295 (9th Cir. 1983). If the claim is not based on a proper legal theory, the claim should be dismissed. *Id.*
3 at 1300.

4 Defendants argue that since plaintiff's substantive claims under 31 U.S.C. § 3730 have been
5 dismissed, that it follows that her § 3730(h) claim should likewise be dismissed because the dismissals of
6 the substantive claims show that her § 3730(h) is not a viable False Claims Act action. Defendants cite
7 *Dookeran v. Mercy Hospital of Pittsburg*, 281 F.3d 105 (3rd Cir. 2002) in support of their argument.
8 *Dookeran*, however, is not the law in the Ninth Circuit. Section 3730(h), standing alone, indicates that
9 plaintiff has adequately pled a claim under that statute. Plaintiff's position is further supported by the Ninth
10 Circuit cases *Moore v. California Institute of Technology*, 275 F.3d 838 (9th Cir. 2002) and *United States
ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996). Those Ninth Circuit cases make it clear that there
11 are three elements that plaintiff must plead and prove in a § 3730(h) claim: (1) The employee must have
12 been engaging in conduct protected under the Act; (2) The employer must have known that the employee
13 was engaging in such conduct; and (3) the employer must have discriminated against the employee because
14 of her protected conduct. The defendant's attack on plaintiff's pleading in this case focuses on the first
15 requirement, that is, whether plaintiff's conduct was protected under the False Claims Act. *Hopper* points
16 out that § 3730(h) "only protects employees who have acted 'in furtherance of an action' under the FCA.
17 Special awareness of the FCA is not required; however, the plaintiff must be investigating matters which
18 are calculated or reasonably could lead to a viable FCA action." *Hopper* at 1269. In *Moore*, the Ninth
19 Circuit expanded on the *Hopper* rule in the following language after referring to *Hopper*: "We reaffirm this
20 standard today and clarify that an employee engages in protected activity where (1) the employee in good
21 faith believes and (2) a reasonable employee in the same or similar circumstances might believe that the
22 employer is possibly committing fraud against the government." *Moore* at 845. That is the current Ninth
23 Circuit law that the court must apply.
24

25 It is clear here from the Second Amended Complaint that plaintiff has alleged that she in good faith
26 believed that her employer was possibly committing fraud against the government. Inherent in her pleading
27 are facts to support the second prong of the test, that is that a reasonable employee in the same or similar
28 circumstances might so believe.

1 Plaintiff's investigation and conduct was, according to the complaint, in furtherance of an action
2 under § 3730 - in fact, such an action was filed. There is no requirement in the statute or in Ninth Circuit
3 case law that such an action must be successful for a whistle-blowing employee to be protected under §
4 3730(h).

5 It is interesting to note in this regard that, in the court's order dismissing the substantive § 3730
6 counts, the grounds for such dismissal were somewhat technical and did not address the ultimate question
7 of whether the defendant was or was not committing some fraud against the government. Defendants'
8 Renewed Motion to Dismiss Relator's Fourth Cause of Action for Retaliation should be DENIED.

9 Procedural Order

10 This also comes before the court on the Joint Status Report of the parties filed on April 7, 2005
11 (Dkt. 29) and on the court's Minute Order Setting Trial, Pretrial Dates and Ordering Mediation (Dkt. 33).
12 The court's assistant reported that in a telephone call she became aware that the parties have not
13 commenced development of a discovery plan, discovery procedures, etc. It was the court's intention upon
14 issuance of the Minute Order Setting Trial, Pretrial Dates and Ordering Mediation (Dkt. 33) that the
15 parties would commence processing the case under FRCP 26 and other federal civil rules and local civil
16 rules, including preparation of a discovery plan and commencement of necessary discovery.

17 IT IS NOW ORDERED:

18 Defendants' Renewed Motion to Dismiss Relator's Fourth Cause of Action (Dkt. 30) is DENIED.

19 It is further

20 ORDERED that the parties shall commence necessary FRCP 26 and discovery procedures.

21 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any
22 party appearing *pro se* at said party's last known address.

23 DATED this 19th day of May, 2005.

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27 Robert J. Bryan
U.S. District Judge
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